STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 23, 2009
v	No. 282849 Kent Circuit Court
BRANDON LEMAR MAYWEATHER, Defendant-Appellee.	LC No. 07-007562-FH

Before: Borrello, P.J., and Murphy and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting defendant's motion to suppress evidence, denying reconsideration, and dismissing the case. Because we conclude that there were no errors warranting relief, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Basic Facts and Procedural History

In June 2007, officer Thomas Niemeyer worked as a community police officer with the Grand Rapids Police Department. As a community officer, Niemeyer did not conduct normal patrols; instead, he addressed quality of life issues that arose in the neighborhood such as drugs, violence, guns, and nuisances such as abandoned houses and cars, and loud music. On the day at issue, an employee of a neighborhood association called Niemeyer and told him that a neighbor of the house at 758 Olympia had complained that the house was vacant and that someone had been going into it and staying there without permission. Niemeyer testified that he decided to go to the house and check the perimeter. He stated that the exterior of the house was filthy, that the grass had not been cut for an extended period, and that trash was piled outside. Niemeyer stated that he also spoke to a neighbor and concluded that the house was vacant. Niemeyer said he walked around the house and found that the rear slider door was "unsecured."

Two other officers arrived and the three officers entered the house through the unsecured door and announced their presence. The house lacked electricity and a toilet on the first floor was filled with feces. Officers saw some personal belongings on the first floor of the house, but one officer stated that the belongings appeared piled as though "somebody had just left all their stuff there." The officers discovered defendant on the second floor of the house. The officers told defendant that the house was suspected of being vacant, but defendant told the officers that he lived in the house. Defendant indicated that he did not have any identification, but that he did

have "dog tags." At some point, defendant and the officers went into defendant's bedroom. The officers noticed "corner baggies," a razor blade, and a scale with white residue on it. One officer testified that while he was attempting to locate defendant's identification, he found a bag of cocaine. The officers then arrested defendant.

Defendant later moved to suppress the cocaine evidence on the ground that it was the product of an illegal search and seizure. The trial court agreed and suppressed the evidence. Because the charge against defendant could not be maintained without the cocaine evidence, the trial court also dismissed the case. This appeal followed.

II. The Search

A. Standard of Review

Plaintiff argues that the trial court erred in suppressing the cocaine found in the home. Specifically, plaintiff asserts that defendant did not have a reasonable expectation of privacy in an apparently abandoned house. We review a trial court's factual findings in connection with a motion to suppress for clear error and review de novo the ultimate legal conclusion. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

B. Analysis

Both the United States and Michigan Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005), citing US Const, Am IV; Const 1963, art 1, § 11. However, not all government intrusions rise to the level of a search; the test is whether the police action violated the defendant's reasonable expectation of privacy in the area searched. *People v Whalen*, 390 Mich 672, 677; 213 NW2d 116 (1973). A person has a legitimate expectation of privacy if the person has an actual, subjective expectation of privacy and that expectation is one that society recognizes as reasonable. *People v Perlos*, 436 Mich 305, 317-318; 462 NW2d 310 (1990). Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the intrusion. *People v Parker*, 230 Mich App 337, 340; 584 NW2d 336 (1998).

The trial court did not clearly err when it found that defendant had an actual, subjective expectation of privacy in the house. Defendant's lease was valid on that date, and he had had a key to the house. Defendant had torn down a notice of abandonment that had been placed on the door. Defendant had established electricity in his name, but the electricity had been shut off. Defendant indicated that the house had running water. Defendant kept belongings and furnishings on both the first and second floor of the house.

Relevant to the determination of a person's reasonable expectation of privacy is whether the defendant "'took normal precautions to maintain his privacy—that is, precautions normally taken by those seeking privacy.'" *People v Taylor*, 253 Mich App 399, 405; 655 NW2d 291 (2002), quoting *People v Smith*, 420 Mich 1, 26; 360 NW2d 841 (1984). Here, the trial court found that it appeared that defendant took the normal precautions, as the house had adequate exterior functioning doors and windows. With respect to the "unsecured" rear sliding door, the

trial court concluded that the door was either unlocked or ajar. With no evidence to the contrary, these findings are not clearly erroneous.

A person has no expectation of privacy in property that appears "by all objective indications" to have been abandoned; therefore, the police officers could reasonably search the house at issue if it appeared to be abandoned. *Taylor*, *supra* at 406. The defendant bears the burden of showing that the property was not abandoned. *Id.* In order to constitute abandoned property, the evidence must reasonably lead to an exclusive inference that the property was thrown away. See *id.* at 406-407. When evaluating whether police officers must secure a warrant before entering what appears to be an abandoned or vacant structure, courts examine a variety of factors:

> (1) the outward appearance, (2) the overall condition, (3) the state of the vegetation on the premises, (4) barriers erected and securely fastened in all openings, (5) indications that the home is not being independently serviced with gas or electricity, (6) the lack of appliances, furniture, or other furnishings typically found in a dwelling house, (7) the length of time that it takes for temporary barriers to be replaced with functional doors and windows, (8) the history surrounding the premises and prior use, and (9) complaints of illicit activity occurring in the structure. Although the listed factors are not exhaustive or otherwise dispositive, a trial court must necessarily place them into the totality of the circumstances equation where a vacant structure is at issue. [*Id.* at 407.]

In *Taylor*, the court concluded that the house at issue reasonably appeared abandoned. *Id*. From its exterior, the house appeared to be unoccupied and abandoned; boards were hung in place of some windows and doors, and other openings were entirely exposed. *Id.* at 407. Approximately two weeks before the incident resulting in Taylor's prosecution, the officer in that case had been called to the house in question. *Id.* at 400. During that visit, the officer discovered that the house had no running water or working gas. Indeed, the officer noticed that the electric meter box had been disconnected and that there was an extension cord running from a neighboring property to the house. *Id.* at 400-401. The house lacked even the most basic of appliances, and the only furniture was a card table and a few boxes on which to sit. *Id.* at 408. The officer had been dispatched to the house approximately 15 times to investigate narcotics complaint, and had recovered drugs from the house during the previous year. *Id.* at 400.

In this case, the house at issue did not possess the same objective indicia of abandonment as did the house in *Taylor*. The house had all doors and windows intact, but a rear sliding door was either unlocked or ajar. The house contained typical appliances and furnishings. There was no history of any police involvement at the house. The house did not have electricity, but there was no outward indication that the home was not being independently serviced with gas or electricity. In *Taylor*, the officer had known for approximately two weeks that the house had no running water or working gas, that there was raw sewage in the basement, and that it appeared that electricity was being obtained illegally from a neighboring property. In this case, the officers did not know that defendant's house had no electricity until after they had entered. There was no remarkable history surrounding 758 Olympia or its prior use. There was no evidence that police had ever been called to the house.

It was only after officers had arrested defendant that they sought to gather information concerning the house. The housing supervisor informed the officers that the house was to be boarded up very shortly; however, the owner testified that the house had not been abandoned. The only objective factors upon which the officers relied in determining that the house was abandoned were that the yard was unkempt and there was garbage piled up in the yard.

On these facts, we cannot conclude that the trial court erred when it determined that defendant had a reasonable expectation of privacy in the house.

We also reject the notion that the police officers' search of the home fell within the community caretaking exception to the general warrant requirement. See *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999) (noting that searches without warrants are per se unreasonable unless a warrant exception applies). Under the community caretaking exception, police generally do not need the probable cause traditionally required in order to enter into a protected area because they are not searching for anything. The defining characteristic of community caretaking functions is that they are totally unrelated to the criminal investigation duties of police. *People v Davis*, 442 Mich 1, 11-12, 22; 497 NW2d 910 (1993). Police perform caretaking functions when they impound vehicles, respond to missing vehicle complaints, investigate noise complaints, remove intoxicated people from streets, search unconscious people for identification, and render aid to people in distress. *In re Forfeiture of $176,598*, 443 Mich 261, 273-274; 505 NW2d 201 (1993).

In this case, the officers were not performing a community caretaking function. The responding officer received a call from a neighborhood association employee concerning the house at 758 Olympia. The employee told the officer that 758 Olympia was supposed to be vacant. The employee relayed that a neighbor had complained that the house was in poor condition and that the neighbor had seen someone going into the house and staying there without permission. The responding officer testified that he went into the house to investigate a possible trespass. The officers made no attempt to locate the owner of the house until after they entered and arrested defendant; they did not contact the Housing Authority to see if the house had been declared abandoned until after the arrest; nor did they knock on the house's door to determine if anyone was in the house legally.

Entering a house to arrest trespassers following a complaint from a neighbor is unlike impounding vehicles, responding to missing vehicle complaints, investigating noise complaints, removing intoxicated people from streets, searching unconscious people for identification, or rendering aid to people in distress. Trespassing is a criminal offense. Responding to a complaint of trespassers in a house, vacant or otherwise, is an investigation of a criminal matter. Hence, this exception did not apply.

Because defendant had a reasonable expectation of privacy in his home, and because the officers searched that home without a warrant or pursuant to a valid warrant exception, the unconstitutionally seized evidence must be excluded. *People v Goldston*, 470 Mich 523, 528; 682 NW2d 479 (2004). The trial court did not err when it suppressed the cocaine evidence and dismissed the charges.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Michael J. Kelly